

# To Pick an Argument

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Maximilian Steinbeis Sa 14 Apr 2018

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Hungary has voted, Viktor Orbán has regained his two-thirds majority, and what he will do with it is a matter of imagination, inspired for example by the publication of a black list of more than 200 so-called "Soros mercenaries" from science, media and civil society by a Fidesz-related magazine. A list of further causes for concern can be found in the recently published report of the Green MEP Judith Sargentini: That report gives very concise reasons why, in the ninth year of the Orbán government, Hungary poses no less of a threat to democracy, the rule of law and fundamental rights in the EU than Poland, while the latter is subject to an Article 7 procedure initiated by the Commission, and the former is not. The document is well worth reading, even though it stands but little chance of getting an EU procedure against Hungary underway as long the powerful EPP parliamentary group under its chairman Manfred Weber insists on finding Orbán the very picture of a modern democratic leader whose ability to get 48% of the Hungarian vote should clear him from every doubt about his democratic credentials for all intents and purposes. A few dissenters within the EPP remain, though, and they deserve our praise and encouragement. BTW, here is an opportunity to sign a call on Chancellor Merkel to end that disgrace, by the Harvard political scientist and best-selling author Yascha Mounk.

Oh, well. I remember weeks at the end of which I felt better prepared to radiate confidence and optimism. This is also due to my little trip to Poznań which I announced in my last editorial.

The venerable Instytut Zachodni (Institute of Western Affairs) had invited to a conference on the "Challenge for the Application of Rule of Law in European States" and placed four gentlemen on the podium, two from Poland, two from abroad: The German constitutional judge Peter Müller and the former President of the Austrian Federal Administrative Court Clemens Jabloner acted as advocates of the liberal constitutional state of the Western mold; two professors from the Jagiellonian University in Krakow, constitutional lawyer Andrzej Bryk and legal historian Andrzej Dziadzio, took the opposite position of a "new constitutionalism" (Bryk) according to which PiS and all constitutional transformations it has brought about since 2015 are, in fact, a paragon of democratic virtue. One could, from that 2:2 setup, get the impression that Western observers and Polish experts in general see things along those two respective lines (which they don't, in fact, from what I can tell). Whether or not that was intended by the organizers, I cannot say.

The more passionately Müller and Jabloner reacted to the constitutional theory dished up by the two professors from Krakow, the more polite and professorial was the conduct of those. Yes, of course, one may very well see things that way if you are a constitutional judge and want to defend that position, and for the German and Austrian constitutional order all this may or may not make perfect sense, but he, said Professor Bryk, was actually more interested in the model of the USA: No-one there would think of entrusting a separate constitutional court with abstract judicial review. The ultimate source of the Supreme

Court's power is the will of the American people, and whenever the Court tried to get in the way of the will of the people, for instance during Roosevelt's New Deal, it didn't end well for the Court. In Madison's separation of powers, according to Bryk, access to the constitution is not a monopoly of the judiciary but a matter for all three branches of government. While he understands, added Professor Dziadzio, that in Germany, after the Nazi experience, people prefer to take the side of the law in the field of tension between democracy and the rule of law, in the end, sovereignty belongs to the people and not the law.

All this was not overly compelling, and Müller and Jabloner had no trouble to come up with powerful arguments to counter it. But all that felt like punching into a bag of cotton wool. There was no real conversation, no actual engaging in controversy. Bryk and Dziadzio remained polite and correct at all times, they never raised their voices, and when at the end everyone went to dinner and I came to sit next to Bryk, he asked me in a jovial and slightly condescending tone if I knew that the EU flag of stars, according to the will of Schumann, Adenauer and De Gasperi, was originally supposed to symbolize the halo of the Virgin Mary? No. I didn't know that, in fact.

Both Müller and Jabloner were professional enough not to get upset, with some effort at times, so it seemed. Jabloner had a very strong moment when he actually did raise his voice a bit for a second. That was when Dziadzio came to talk about the Polish constitution of 1997 which, according to Dziadzio, was a compromise between reform communists and liberals, whereas now, 20 years after, the sovereign people had elected a conservative majority to power, so to bind that majority to the constitution to keep them from doing what they were elected for was undemocratic. Oh, said Jabloner with poignant sarcasm, could the professor please answer simple question: Does it take a two-thirds majority to amend the 1997 Constitution? Yes, Dziadzio confirmed. And does the conservative majority, which feels restricted by the 1997 Constitution, possess a two-thirds majority? Hmm. For a moment Dziadzio was at loss to see what the guest from Vienna was getting at. But then that moment passed. And Dziadzio, perfectly correctly, answered Jabloner's question: No. It does not.

## Heads and scarves

DANIEL SARMIENTO's contribution to the debate about the Puigdemont affair shows that it is possible to argue passionately *and* productively about the most sensitive constitutional matters. Sarmiento has little patience with the decision of the German Higher Regional Court of Schleswig not to extradite the Catalan secessionist leader wanted by Spain for "rebellion". My recommendation: scroll on after the end. For once, despite the usual outliers probably inevitable with a topic as emotionally charged as this, it is actually worth reading the comments section.

In Germany and in Austria, certain parts of the political spectrum consider it urgent to finally tackle the problem of Muslim kindergarten girls forced to wear headscarves before it gets completely out of hand. ALEXANDER SOMEK is "embarrassed" by this process which reveals that "liberalism in Austria has still not advanced beyond a contemptuous attitude towards the socially disadvantaged" (German).

After Viktor Orbán's election victory in Hungary, VIKTOR KAZAI takes on the Fidesz

election campaign and shows how the border between official government and unofficial party communication is blurred beyond recognition, without anyone being greatly disturbed by it in terms of constitutional law.

The member states of the European Convention on Human Rights have adopted the Copenhagen Declaration on the reform of the ECHR. The criticism of the draft, which ARGELIA QUERALT describes, seems to have had some impact.

PETRA BÁRD and WOUTER VAN BALLEGOOIJ analyse the Irish High Court's referral judgment on Polish arrest warrants and their consequences for the system of mutual trust in the EU.

## Elsewhere

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ED BATES has some preliminary thoughts about the final version of the Copenhagen Declaration on the European Court of Human Rights, and GEIR ULFSTEIN finds what is not in it more interesting than what is.

ANTOINE BUYSE points out that France's ratification will bring into force the 16th Additional Protocol to the European Convention on Human Rights – which means that in future the supreme courts of the member states will be able to refer questions to the Strasbourg Court of Justice, not unlike the ECJ.

STEVE PEERS investigates the ECJ ruling on the right to family reunification for under-age fugitives.

SARAH KEY remembers her childhood in Northern Ireland, in conflict-ridden West Belfast, and contemplates the ways Brexit puts the overcoming of those times at risk.

ESTELLE CHAMBAS proposes to French President Macron to take the British model of fast-tracking legislation as a model for his plans to make the legislative process more efficient (French).

ILYA SOMIN reminds US President Trump that he is constitutionally bound to seek the approval of Congress before he enters a large-scale war operation in Syria. KEVIN JON HELLER points out that a US attack in Syria in breach of international law would give Assad troops the right to lawfully shoot down American planes and kill American soldiers.

SARAH KEENAN tells the story of the second smallest state in the world, the West Pacific island of Nauru, where Australia extraterritorializes its refugee problems – especially worth reading.

FRANCISCA POU GIMÉNEZ examines the impact of the increasing activism of the Inter-American Court of Human Rights.

That's enough for today. As I write this, the news comes in about the air raids in Syria. God help us. See you next week, and all the best!

Max Steinbeis

*A previous version of this article contained a factual error: Clemens Jabloner was not only*

*Vice President, but in fact for many years President of the Supreme Administrative Court of Austria. That error is corrected. Apologies!*

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